



Signed: April 14, 2006

Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

No. 00-44500 TT
Chapter 7

LARRY FRAGA, etc.,

Debtor.

LARRY FRAGA,

A.P. No. 06-4005 AT

Plaintiff,

vs.

THE DUBOFF LAW GROUP, LLC,
etc., et al.,

Defendants.

MEMORANDUM OF DECISION RE MOTION FOR SANCTIONS

Defendant The DuBoff Law Group, LLC (the "DuBoff Law Firm") moves for Rule 9011 sanctions against Plaintiff Larry Fraga ("Fraga") and his counsel, Kristine Kelly ("Kelly"). For the reasons stated below, the motion is granted. The sanctions awarded are set forth below.

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SUMMARY OF FACTS

An involuntary chapter 7 petition was filed against Fraga in August 2000. An order for relief was entered on September 6, 2000. Prior to the filing of the involuntary petition, Fraga employed the DuBoff Law Firm to represent him as legal counsel in connection with copyright matters.¹ A written retainer agreement was executed on May 19, 2000 (the "Retainer Agreement"). Fraga did not inform the DuBoff Law Firm about the bankruptcy case when it was filed and did not schedule it as a creditor.

The DuBoff Law Firm performed legal services for Fraga both before and after the commencement of the bankruptcy case. It sent monthly invoices to Fraga. Fraga paid the invoices in full on a timely basis until June 2001. He made only a partial payment for June 2001, no payment for August 2001, and only a partial payment for September 2001. Thereafter, he made no payments.

In October 2002, the DuBoff Law Firm filed suit against Fraga in Oregon state court for the unpaid fees and costs (the "Oregon State Court Action"). It served Fraga with the complaint and, when no answer was filed, took Fraga's default. At this point, the DuBoff Law Firm learned of Fraga's bankruptcy. As a cautionary matter, the DuBoff Law Firm moved to have the Oregon State Court Action abated and filed a proof of claim for the unpaid fees. The chapter 7 trustee objected to the proof of claim on the ground that the underlying services were performed post-petition and therefore did

¹The actual firm retained was the DuBoff Law Firm's predecessor in interest: DuBoff, Dorband, Cushing and King.

1 not give rise to a claim against the bankruptcy estate. The claim
2 was disallowed.

3 Fraga received his discharge on January 23, 2002. Thereafter,
4 the DuBoff Law Firm reactivated the Oregon State Court Action and
5 obtained a default judgment (the "Judgment"). The DuBoff Law Firm
6 then obtained a sister state judgment in California and scheduled a
7 debtor's examination. When Fraga failed to appear, the DuBoff Law
8 Firm obtained a bench warrant for his arrest.

9 In response to the bench warrant, Fraga filed a motion in state
10 court in California to stay the enforcement of the Judgment and to
11 recall the bench warrant. Fraga alleged that his bankruptcy barred
12 enforcement of the Judgment. The state court denied Fraga's motion,
13 concluding that the bankruptcy did not bar the enforcement of the
14 Judgment because it was based on a post-petition debt. The state
15 court in California awarded the DuBoff Law Firm its attorneys' fees.

16 Thereafter, Fraga filed a complaint in this court, commencing
17 the above-captioned adversary proceeding (the "Complaint"). The
18 Complaint alleged that, by continuing to prosecute the Oregon State
19 Court Action and by attempting to enforce the Judgment in California,
20 the DuBoff Law Firm had violated the injunction protecting Fraga from
21 the enforcement of discharged debts. See 11 U.S.C. § 524(a)(2).

22 The Complaint alleged that the Judgment was based on a debt
23 incurred for legal services performed, for the most part, pre-
24 petition and that the only legal services performed post-petition
25 were for tracking Fraga's bankruptcy case and attempting to collect
26 the unpaid fees and costs. It alleged that the DuBoff Law Firm had

1 obtained a bench warrant for Fraga's arrest in an attempt to enforce
2 the Judgment and that Fraga had filed a motion to stay this action.
3 It did not disclose that the California state court had denied its
4 motion and ruled that the underlying debt was a post-petition debt
5 that was not discharged.

6 The DuBoff Law Firm filed a timely answer to the Complaint.
7 Thereafter, on March 3, 2006, the DuBoff Law Firm filed two motions:
8 (1) a motion for summary judgment and (2) a motion for Rule 11
9 sanctions. The motions came on for hearing on April 6, 2006. The
10 Court granted the motion for summary judgment at the hearing, making
11 an oral ruling from the bench. It took the motion for sanctions
12 under submission.

13 DISCUSSION

14 Rule 9011(a) provides that [with exceptions not relevant here]
15 every pleading shall be signed by an attorney individually. Rule
16 9011(b) provides that:

17 ...by presenting to the court...a...pleading,
18 an attorney...is certifying that to the best of
19 the person's knowledge, information, and belief,
20 formed after an inquiry reasonable under the
21 circumstances,--

22 (1) it is not being presented for any
23 improper purpose, such as to harass or to cause
24 unnecessary delay or needless increase in the
25 cost of litigation;

26 (2) the claims, defenses, and other legal
contentions therein are warranted by existing
law or by a nonfrivolous argument for the
extension, modification, or reversal of existing
law or the establishment of new law;

(3) the allegations and other factual
contentions have evidentiary support or, if
specifically so identified, are likely to have
evidentiary support after a reasonable
opportunity for further investigation or

1 discovery; and

2 (4) the denials of factual contentions are
3 warranted on the evidence, or, if specifically
4 so identified, are reasonably based on lack of
5 information or belief.

6 Fed. R. Bankr. Proc. 9011(b).

7 The DuBoff Law Firm's summary judgment motion contended that
8 there was no material factual issue in dispute in connection with the
9 adversary proceeding and that it was entitled to judgment in its
10 favor as a matter of law. It contended that there was no material
11 factual dispute regarding whether the legal services it provided to
12 Fraga, upon which the Judgment was based, were provided post-
13 petition. It contended that there was no nonfrivolous legal issue as
14 to whether a debt based on legal services which were provided post-
15 petition constituted a post-petition debt regardless of whether they
16 were provided pursuant to the retainer agreement executed pre-
17 petition.² In support of the latter contention, the DuBoff Law Firm
18 cited In re Hines, 147 F.3d 1185 (9th Cir. 1998) and In re Tredinnick,
19 264 B.R. 573 (Bankr. 9th Cir. 2001).

20 In Hines, Hines, while a chapter 13 debtor, retained an attorney
21 ("Gordon") to convert the case to chapter 7. Because Hines was
22 unable to pay Gordon's fee in full up front, Gordon and Hines entered
23 into a written agreement for payment of the fee in installments.

24 ²In support of the motion, the DuBoff Law Firm filed the
25 Declaration of James Filiault (the "Filiault Declaration").
26 Attached to the Filiault Declaration are copies of the invoices
describing the legal services upon which the Judgment was based and
providing the dates when the services were provided. The dates are
all post-petition and the services described bear no connection to
Fraga's bankruptcy case and indicate numerous post-petition
communications with Fraga.

1 Hines gave Gordon several post-dated checks. After the case was
2 converted, Hines stopped payment on the checks, contending that the
3 debt was a pre-petition debt which was subject to the automatic stay
4 and due to be discharged. The bankruptcy court denied the motion,
5 concluding that the debt, which was at that point solely for services
6 performed post-conversion, was a post-petition debt. The bankruptcy
7 appellate panel reversed. However, its decision was reversed in turn
8 by the Ninth Circuit Court of Appeals. 147 F.3d at 1187-88.³

9 In Tredinnick, the Tredinnicks entered into an oral agreement
10 for legal services with a paralegal awaiting bar results. The
11 paralegal prepared several documents for them, for which he was not
12 paid. He continued to do so after the Tredinnicks filed a chapter 7
13 case. The services provided by the paralegal were not in connection
14 with the bankruptcy case. After the bankruptcy case was closed and
15 the Tredinnicks failed to pay for the services provided, the
16 paralegal filed a breach of contract action. The Tredinnicks
17 responded by having their bankruptcy case reopened and filing an
18 adversary proceeding, seeking a determination that their debt to the
19 paralegal had been discharged. They contended that the debt was a
20 pre-petition debt because it was based on a pre-petition contract.

21 After a trial, the bankruptcy court found for the Tredinnicks.
22 The bankruptcy appellate panel reversed. 264 B.R. at 574-75. The
23

24 ³The principal analysis of the majority opinion is somewhat
25 convoluted. However, it also offers the following much simpler
26 alternative rationale which was embraced by the concurring opinion:
"[A] prepetition contract for postpetition legal services does not
give the attorney a claim against the estate." Hines, at 1192
(concurring op'n).

1 panel relied in part on the concurring opinion in Hines. Id. at 575-
2 76. They also cited the following language from a subsequent Ninth
3 Circuit Court of Appeals decision: "'There is no question after *Hines*
4 that a reasonable fee for post-petition services is not a
5 dischargeable debt and may be collected in the course of the
6 bankruptcy without violating the automatic stay.'" See In re
7 Sanchez, 241 F.3d 1148, 1150-51 (9th Cir. 2001, cited in Tredinnick,
8 264 B.R. at 573.

9 Fraga filed an opposition to the motion for summary judgment
10 four days after it was due. The only basis stated for the opposition
11 was that the debt was necessarily pre-petition because the Retainer
12 Agreement was executed pre-petition. In support of argument, he
13 cited In re Abercrombie, 139 F.3d 755 (9th Cir. 1998). In
14 Abercrombie, the Ninth Circuit denied administrative priority status
15 to a claim by a third party for a post-petition award of fees and
16 costs against a chapter 11 debtor who unsuccessfully defended an
17 appeal from a pre-petition judgment. The Abercrombie court held that
18 "costs and expenses arising out of prepetition contracts are treated
19 under the Bankruptcy Code as non-prioritized unsecured claims." 139
20 F.3d at 757. Fraga did not discuss or attempt to distinguish the
21 holdings in Hines or Tredinnick. Clearly, Abercrombie is
22 distinguishable on its facts and does not contradict the much more
23 pertinent authority of the cases cited by the DuBoff Law Firm.

24 The motion for sanctions is not based on the opposition to the
25 motion for summary judgment. It is based on the Complaint. There
26 are two bases for the motion: (1) legal and (2) factual. First, the

1 motion contends that, based on the cases cited above, no competent
2 attorney could make a good faith argument that the Judgment
3 represented a pre-petition debt simply because the Retainer Agreement
4 was executed pre-petition. Second, it contends that the Complaint
5 contains gross misstatements as to the underlying facts. The Court
6 agrees with both contentions.⁴

7
8 **(1) Legal Basis**

9 As discussed above, Ninth Circuit law does not support the legal
10 theory upon which the Complaint is based. Although an unsuccessful
11 litigant is not generally subject to Rule 9011 sanctions, such
12 sanctions are appropriate if no competent attorney, acting in good
13 faith, could have concluded that the law supported the claim
14 asserted. Based on the authorities cited above, the Court concludes
15 that this is the case here. Hines and Tredinnick make it clear that,
16 in the Ninth Circuit at least, legal services provided to a chapter
17 7 debtor post-petition constitute a post-petition debt of the debtor
18 notwithstanding the existence of a pre-petition contract to provide
19 the services.

20 Kelly may have failed to conduct adequate research before filing
21 the Complaint so as to determine the relevant law. That, in itself,
22 given the lack of any extreme time pressure, would constitute a
23 violation of Rule 9011. However, even so, she could have avoided
24 being sanctioned by dismissing the Complaint when informed of Hines

25 ⁴The brief filed in opposition to the motion, again four days
26 late, contained nothing of any substance. It merely repeated the
arguments set forth in the opposition to the motion for summary
judgment.

1 and Tredinnick by the DuBoff Law Firm.⁵ There is no explanation,
2 other than incompetence or bad faith, for her having continued to
3 prosecute the adversary proceeding after receiving a copy of the
4 sanctions motion. No reasonable attorney could have believed that
5 the holding in Abercrombie would apply to the facts presented here
6 with more force than the holdings in Hines and Tredinnick.

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8 **(2) Factual Basis**

9 The misrepresentations of fact, as alleged in the Complaint, are
10 even more shocking. The DuBoff Law Firm cited the following four
11 misstatements of fact contained in the complaint.

- 12 1. "The Declaration [of Christopher Brown] was based upon fees
13 DUBOFF claims it 'incurred' in pursuing FRAGA for pre-
petition debts that had already been discharged."
[Complaint, para. 9]
- 14 2. "It is clear by examining the attached Exhibits that DUBOFF
15 asserted a claim in the Bankruptcy Court for pre-petition
debt, incurred by way of the May 2000, contract."
16 Complaint, para. 13]
- 17 3. "DUBOFF fabricated the post-petition fees veiling the very
18 debt it attempted to assert, but was denied, in Bankruptcy
the [sic] Court, hoping to avoid statutory language and
authority from the 9th Circuit." [Complaint, para. 14]
- 19 4. "All of the alleged post-petition fees sought by DUBOFF are
20 for costs incurred by DUBOFF in tracking the status of
FRAGA's bankruptcy case and DUBOFF's costs in preparing its
21 lawsuit for the claim herein. None of the entries and fees
associated therewith arose from any work done at FRAGA's
22 request. It was purely for DUBOFF's financial gain to
pursue FRAGA on a pre-petition debt." [Complaint, para.
23 15.]

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⁵Before filing the motion for sanctions, the Duboff Law Firm
26 served a copy of the motion on Kelly, giving her an opportunity to
dismiss the Complaint voluntarily in order to avoid incurring
sanctions as required by Rule 9011(c)(1)(A).

1 As noted by the DuBoff Law Firm, attached to the Complaint is a
2 copy of the Declaration of Christopher Brown (the "Brown
3 Declaration") in support of the DuBoff Law Firm's request for a
4 default judgment in the Oregon State Court Action. As filed with
5 the Oregon State Court, according to the DuBoff Law Firm, the Brown
6 Declaration contained as an exhibit a complete description of the
7 services provided for which the judgment was sought.

8 Fraga omitted the bulk of this exhibit from the Brown
9 Declaration when he attached it to the Complaint. The pages included
10 described only those fees incurred after Fraga had defaulted in
11 making payments and the DuBoff Law Firm was attempted to collect its
12 debt. Omitted were the pages describing the numerous substantive
13 legal services performed post-petition for Fraga's benefit in
14 connection with copyright matters. It is impossible to conclude that
15 this selective omission was accidental. This concept goes beyond
16 incompetence or frivolousness and constitutes an attempted fraud on
17 the court. This is particularly true when coupled with the failure
18 to disclose the fact that the California state court had already
19 ruled that the debt was post-petition. The Court notes that Kelly
20 was counsel of record for Fraga in that proceeding.

21 **Nature and Allocation of Sanctions**

22 Rule 9011(c) provides that, if the Court concludes that Rule
23 9011(b) has been violated, the Court may, subject to certain
24 conditions, impose an appropriate sanction upon the attorneys, law
25 firms, or parties responsible for the violation. Rule 9011(c)(1)(A)
26 provides that, when the sanctions are based on a motion filed by a

1 party, the court may award the prevailing party its reasonable fees
2 and expenses in presenting or opposing the motion. It may also
3 include a nonmonetary sanction or an order directing a specified sum
4 to be paid to the Court. Rule 9011(c)(2) provides that the sanction
5 should be sufficient to deter repetition of such conduct either by
6 the party or as an example by other similarly situated parties. The
7 limiting conditions are that monetary sanctions may not be awarded
8 against a represented party for a violation of subdivision
9 (b)(2)(asserting frivolous claims or defenses).

10 In its motion for sanctions, the DuBoff Law Firm requested only
11 its attorneys' fees and costs in connection with this adversary
12 proceeding. The Court grants this request. Since the basis for its
13 ruling is both factual and legal in nature, this sanction will be
14 imposed jointly and severally on both Kelly and Fraga.

15 The DuBoff Law Firm has not yet quantified the fees and costs
16 requested. The Court directs it to do so by filing a statement of
17 fees and expenses and serving them on Fraga within 30 days from the
18 date of service of this Memorandum. Fraga will be given 14 days from
19 the date of service of the statement to file an opposition to the
20 amount of the request. No late filed opposition will be considered.
21 If a timely opposition is filed, the DuBoff Law Firm will be given 7
22 days from the date of service of the opposition to file a reply and
23 a proposed form of order. The Court will consider the amount of the
24 sanctions to be awarded upon receipt of the reply and proposed form
25 of order.
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However, in light of the apparent fraud on the Court committed by Kelly with regard to factual matters, the Court is not satisfied that this compensatory award adequately serves the deterrence purpose of Rule 9011. The Court is contemplating a further sanction, either monetary or nonmonetary, to be imposed on her. In determining whether to impose such a sanction and the sanction to be imposed, the Court will consider any explanation for her conduct provided by Kelly in a declaration filed by no later than 30 days from the date of service of this memorandum.⁶

END OF DOCUMENT

⁶The DuBoff Law Firm also requested that the adversary proceeding be dismissed with prejudice as a further sanction. However, the Court has already ordered summary judgment in its favor which provides comparable relief. A proposed form of judgment should be submitted with the proposed form of order. The Court has previously issued a 60 day dismissal order in this case as a monitoring device. In the event the judgment is not entered within the 60 days, the Court will retain jurisdiction to issue the relief set forth herein, nunc pro tunc if necessary.

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